Supreme Court, U.S.
FILED
JAN 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-680

In the Supreme Court of the United States

OCTOBER TERM, 1986

HENRY C. CLANCY, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that petitioner should recover no more than $5,500.00 in attorney fees.

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OPINIONS BELOW

The orders of the court of appeals on petitioner's applications for attorney fees (Pet. App. 1b-2d) are unreported.

JURISDICTION

The final order of the court of appeals on petitioner's application for attorney fees was entered on October 1, 1986. The petition for a writ of certiorari was filed on October 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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STATEMENT

Petitioner challenges three unpublished orders of the court of appeals denying portions of his applications for attorney fees.

1. In an unpublished decision dated August 30, 1985 (Pet. App. 1a-4a), the court of appeals reversed a decision of the Merit Systems Protection Board (MSPB) which had sustained the decision of the Federal Aviation Administration (FAA) to remove petitioner for participation in a strike against the United States and for being absent without leave. Finding that petitioner's participation in the strike had been coerced by the union and that the FAA had been derelict in not protecting him from this coercion, the court concluded (*id.* at 4a):

> Considering the record as a whole, the removal of petitioner must be set aside as not in accordance with law and unsupported by substantial evidence. Alternatively, the agency action is tainted by a prohibited personnel practice. 5 U.S.C. Section 2302(a). The decision of the MSPB is, accordingly, reversed.

2. On September 30, 1985, petitioner filed an application for attorney fees. Under the Equal Access to Justice Act (EAJA), 28 U.S.C. (& Supp. III) 2412, petitioner sought $52,822.00 in attorney fees and $1,119.22 in expenses for the judicial portion of his action. Under the Back Pay Act, 5 U.S.C. 5596 (b)(1)(A)(ii), petitioner claimed $8,638.00 in attorney fees and $253.52 in expenses for the administrative portion of the case. Petitioner's application for fees asserted that he had actually paid his counsel $5,273.00 in fees and $1,821.00 in expenses. Pet. App. 1b-2b.[1]

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[1] Action on the application was stayed pending the en banc decision of the Federal Circuit and a decision by the gov-

Petitioner filed a "Supplemental Application For Attorney's Fees and Expenses" on February 4, 1986. In it, he claimed entitlement under EAJA to an additional award of $16,828.00 in attorney fees and $244.13 in expenses for efforts expended by his counsel after the court's decision. These efforts allegedly included research on the amount of back pay to which petitioner was entitled, preparation of an (unsuccessful) motion for rehearing, and conferences with petitioner about such matters. Pet. App. 2b-3b.

A "Second Supplemental Application For Attorney's Fees and Expenses" was filed on April 4, 1986. Petitioner sought an additional award under EAJA of attorney fees and expenses of $8,270.91. He claimed that this was to pay his counsel for "[r]esearch[ing] court mandate" and the court's rules regarding final judgments, preparing materials for the back pay claim, consulting with petitioner regarding his employment records and the necessity to return to work, and settlement negotiations. Pet. App. 3b.

On June 24, 1986, petitioner filed a "Third Supplemental Application for Attorney's Fees and Expenses," claiming fees of an additional $2,722.00 and expenses of an additional $126.72 under EAJA. The tasks allegedly being performed by counsel were simlar to those in the previous application. Pet. App. 3b-4b.

On July 24, 1986, petitioner filed a "Final Supplemental Application for Attorney's Fees and Ex-

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ernment on whether to seek certiorari in *Gavette* v. *Office of Personnel Management*, 785 F.2d 1568 (Pet. App. 4b). *Gavette* was decided on February 28, 1986, and held that the Back Pay Act, and not EAJA, applied to fee awards for proceedings before the MSPB, but that EAJA could then be applied to fee awards on the appeal to the Federal Circuit.

penses," in which he claimed additional attorney fees and expenses under EAJA of $3,956.80 (Pet. App. 3c). This claim was based largely upon efforts alleged to have been expended in reviewing the FAA's back pay calculations.

In sum, petitioner's various applications for attorney fees and expenses sought fees and expenses totalling $99,960.30.[2]

3. a. On July 25, 1986, the court of appeals issued an order (Pet. App. 1b-7b) addressing all of petitioner's applications except the final supplemental application. The court first denied petitioner's supplemental applications (*id.* at 4b-5b) on the ground that,

> [*i*]*nter alia*, the applications are not "supplemental" to the original application in that the original bases asserted for entitlement do not *ipso facto* apply to the subsequent work necessary to obtain [the government's] compliance with the judgment.

Second, the court ordered petitioner and his counsel to submit verified statements with respect to the appellate fee arrangements between them, accompanied by copies of any written agreements on the subject. Any statements of unpaid billings were also to be supplied, along with statements as to the dollar amounts of the recovery received and expected to be received. *Id.* at 5b. Third, the court ordered the government to respond to the original application and to submit, as part of its response, a verified statement of the amount of time spent by its attorneys between the date of the MSPB presiding official's decision and the date of the court's decision. The gov-

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[2] The figure is taken from petitioner's final application.

ernment was also directed to bring to the court's attention any decision of this Court regarding, in particular, awards of fees not actually incurred when the client was engaged in vindicating only a private right. *Id.* at 5b-6b. Finally, the court denied petitioner's request that his counsel be compensated at a rate for his appellate work in excess of the $75.00 per hour set forth in EAJA (*id.* at 7b).

b. In an order entered on August 13, 1986, the court of appeals denied petitioner's fifth and "final" application for fees, referring to its July 25, 1986, order denying all but petitioner's original fee application (Pet. App. 1c-3c).

c. Petitioner's submission pursuant to the court's July 25, 1986, order advised, among other things, that the fee agreement between counsel and petitioner required petitioner to pay $4,000 and expenses for counsel's services during the administrative proceedings, and $1,500 and expenses for services performed in connection with the judicial proceedings (see Pet. 7, 9).

On October 1, 1986, the court of appeals issued its order on petitioner's initial application for fees and expenses (Pet. App. 1d-2d). It provided in toto (*ibid.*):

> Having considered the submissions of the parties, the nature, quantity, and quality of the work involved, and that the merits in this case involved essentially factual rather than legal issues, it is hereby
>
> ORDERED that [petitioner] is awarded $4,000.00 in fees and $12.60 in expenses under the Back Pay Act for work done before the Board (an amount which the government does not contest), and $1,500.00 in fees and $2,323.68

in expenses under the Equal Access to Justice Act for work done before this court.

ARGUMENT

Petitioner contends that the court of appeals erroneously ruled that (1) awards of attorney fees under the Equal Access to Justice Act are limited to the amount actually incurred by the party, (2) awards under the Back Pay are similarly limited, and (3) fees may never be awarded under EAJA for post-decision activity. The court of appeals made none of these rulings, and its computation of an appropriate award based on the evidence submitted by petitioner does not merit review by this Court.

1. Contrary to petitioner's contention, the court of appeals did not say that it was interpreting EAJA to limit attorney fee awards to the amount actually incurred by the client. The government expressly told the court that there is no such limitation (see 8/21/86 Respondent's Opposition to Petitioner's Application for Attorney Fees and Expenses (Respondent's Opposition) 8 n.14, 12 n.22, 24-25 n.36). In doing so, we brought to the court's attention (*id.* at 24-25 n.36) the explicit legislative history to the contrary: "the computation of attorney fees [under EAJA] should be based on prevailing market rates without reference to the fee arrangements between the attorney and client." H.R. Rep. 96-1418, 96th Cong., 2d Sess. 15 (1980).

While the court of appeals did not explain its calculation except as stated above (pages 5-6), it evidently concluded that, in this case, the only reliable evidence of an appropriate fee was the amount actually incurred. We argued below that petitioner's EAJA application was so obviously excessive that a

fee award should be denied altogether or at least in large part (Respondent's Opposition 22-30). For example, we questioned the claimed expenditure of 377.3 hours by two lawyers (22 times the amount expended by the government) on an appeal after 61 hours had already been expended below (*id.* at 22-23), and we pointed out that the application included a claim that three hours were required to prepare a one-page notice of appeal (*id.* at 29 n.44). Similarly, we noted that the claimed $140 per hour rate for lead counsel was neither statutorily nor factually justified (*id.* at 26-27). The court of appeals evidently concluded, after review of these and other excesses, that the only reliable documentation submitted by petitioner—who bears the burden, of course, of demonstrating the fees to which he was entitled—was the fee agreement.

2. The court of appeals did not state that recovery under the Back Pay Act is invariably limited to the fee obligation incurred. The government argued that the $140 hourly rate claimed by petitioner was unreasonable (Respondent's Opposition 13-15).[3] The court of appeals may have concluded that the unreasonable rate claimed by petitioner left it with no

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[3] We pointed out that the $140 hourly rate grossly exceeded petitioner's counsel's own valuation of his services (in the fee agreement) at $90 an hour; that the supporting affidavits of other lawyers in Tuscon were inadequate; that petitioner's counsel had not even supplied the court with evidence of his own customary rate in cases of this nature; and that he had not established that his qualifications merited more than $90 an hour. We did not challenge the $90 figure or the number of hours claimed, although of course the court was not bound to accept them. If the $90 figure were used and petitioner's counsel's hours were fully credited, the total Back Pay Act award would be $5,553, or $1,553 more than petitioner paid his counsel and received in the award.

choice but to award the amount actually incurred, without reaching the question whether a properly documented claim for an amount greater than the incurred amount would have to be rejected.

In any event, as we argued to the court of appeals (Respondent's Opposition 8-13), the Back Pay Act does *not* allow the award of attorney fees in excess of the amount incurred by the client. The Back Pay Act (5 U.S.C. 5596(b)(1)(A)(ii)) provides for the award of "reasonable attorney fees," but also contains a requirement, which has been read to apply to all Back Pay Act fee cases, that the awards be "in accordance with standards established under [5 U.S.C. 7701(g)]."[4] Section 7701(g)(1), in turn, provides for payment of "reasonable attorney fees *incurred* by an employee" (emphasis added). See also, *e.g.*, *Sterner* v. *Department of the Army*, 711 F.2d 1563, 1565-1566 (Fed. Cir. 1983) (dicta). Unlike EAJA, for instance (see page 6, *supra*), there is nothing in the legislative history of the Back Pay Act to indicate that fees were not to be limited to the amount incurred. Fee-shifting is the exception, not the rule (*Alyeska Pipeline Service Co.* v. *Wilder-*

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[4] The conference report, H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 142 (1978), treated Section 7701(g)'s criteria as applying generally to Section 5596(b)(1)(A)(ii). This is also how the court in *Sims* v. *Department of the Navy*, 711 F.2d 1578, 1579-1581 (Fed. Cir. 1983), the MSPB in *Wells* v. *Harris*, 2 M.S.P.R. 409, 412-413 (1980), and 5 C.F.R. 550.806(c) have interpreted the statute, and we know of no authority to the contrary. See also *Gavette*, 785 F.2d at 1575 & n.40; *id.* at 1581 (Bissell, J., dissenting); *Crowley* v. *Shultz*, 704 F.2d 1269, 1272-1275 (D.C. Cir. 1983). Section 5596(b)(1)(A)(ii) could also be read to require application of the 7701(g) criteria only to a subclass of cases not including the present case; we are aware of no authority supporting that reading, however.

ness Society, 421 U.S. 240 (1975)), and, in any event, as a waiver of sovereign immunity the Back Pay Act's attorney fee provision must be strictly construed. *Library of Congress* v. *Shaw*, No. 85-54 (July 1, 1986), slip op. 7-8; *Nibali* v. *United States*, 634 F.2d 494 (Ct. Cl. 1980) (Back Pay Act claim).

There is a logical reason to limit Back Pay Act fees in this way, even though there is no such limit under, for instance, the civil rights statutes.[5] A Back Pay Act claim implicates only private, not public, rights. In no sense can petitioner's counsel be thought of as a "private attorney general" whose efforts merit reimbursement from the public fisc, nor would there have been any reason to make his client more than whole. See 5 C.F.R. 550.801(a) (Section 5596 "authorizes the payment of back pay and reasonable attorney fees for the purpose of making an employee financially whole"); S. Rep. 95-969, 95th Cong., 2d Sess. 115 (1978) (Section 5596(b)(1) provides that an "employee is entitled to be made whole"); cf. *Gavette*, 785 F.2d at 1576. Petitioner points to no authority for the proposition that the fees guaran-

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[5] Indeed, 5 U.S.C. 7701(g) expressly provides that, where the underlying claim is based on discrimination, the "standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k))" apply to the payment of attorney fees. If *all* Back Pay Act attorney fee claims were to be decided under these standards, as petitioner apparently urges, then the proviso quoted would have been superfluous. The legislative history also indicates that, unlike civil rights actions (see *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)), an award to an employee under the Back Pay Act is not to be presumed even when he has prevailed. See H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 142 (1978); S. Rep. 95-969, 95th Cong., 2d Sess. 60-61 (1978). See also 5 C.F.R. 550.806(e).

teed by the Back Pay Act may be greater than the amount contractually agreed upon.

3. Finally, petitioner contends that the court of appeals erroneously concluded that fees may never be awarded under EAJA for post-decision efforts. Here again, however, petitioner mischaracterizes the court's decision. The pertinent part of the order denying the applications for post-decision fees read: "*Inter alia*, the applications are not 'supplemental' to the original application in that the original bases asserted for entitlement do not *ipso facto* apply to the subsequent work necessary to obtain respondent's compliance with the judgment" (Pet. App. 4b-5b). We read this as pointing to the fact that petitioner had made no attempt to show, for the post-decision work, the basic prerequisite that the fees be of the sort recoverable under EAJA,[6] and had not asserted that the government's position was not "substantially justified" (28 U.S.C. (Supp. III) 2412(d)(1)(A)).[7] Again, the presumption is against both

[6] EAJA provides for awards "in any civil action" (28 U.S.C. (Supp. III) 2412(d)(1)(A)), and here, with minor exceptions, the supplemental fees requested were for efforts after the action had ended. Where the post-decision work is entirely derivative of the civil action—for instance, the preparation of a fee application (see *Schuenemeyer* v. *United States*, 776 F.2d 329, 333 (Fed. Cir. 1985))—an award under EAJA may be appropriate, but where the claimant shows no such derivation from the civil action, EAJA is inapplicable. Cf. *Gavette*, 785 F.2d at 1572-1573. Nor did the government argue that all post-decision EAJA fees were barred; indeed, we were not requested and therefore were not entitled to respond to petitioner's supplemental applications at all.

[7] With regard to "substantial justification," it was hardly the government's fault that petitioner, having won the case, could not figure out how to proceed, and petitioner does not

fee-shifting and waivers of sovereign immunity, and the court of appeals evidently concluded that petitioner had not demonstrated enough to overcome this presumption.

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assert that the government's behavior at this point was not substantially justified. Indeed, far from obstructing petitioner's progress, we explained to him a month after the court of appeals' decision that the law is clear that "[his] removal is necessarily cancelled and the agency is required to reinstate [him]," that "[his] entitlement to back pay is governed by the Back Pay Act, which is self-effectuating," and that "if [he] is not satisfied with the relief afforded to him by the [FAA], he can file an enforcement action with the [MSPB]." 10/4/85 Respondent's Opposition to Petitioner's Motion for Partial Remand to the Merit Systems Protection Board 1-2 (footnote and citation omitted). Fees should not be allowed for separable claims in which the government's position was substantially justified. See *Cinciarelli* v. *Reagan*, 729 F.2d 801, 804-805 (D.C. Cir. 1984); *Goldhaber* v. *Foley*, 698 F.2d 193, 197 (3d Cir. 1983); cf. *Hensley* v. *Eckerhart*, 461 U.S. 424, 434-437 (1983).

An analogy may be drawn to the unanimous holdings of those courts of appeals to decide the issue that fees are awardable under EAJA for fee litigation only if the government's position on the fee litigation was not justified, even if the government's position on the merits was not. *United States* v. *Estridge*, 797 F.2d 1454, 1459-1460 (8th Cir. 1986); *Russell* v. *National Mediation Board*, 775 F.2d 1284, 1291 n.8 (5th Cir. 1985); *Continental Web Press, Inc.* v. *NLRB*, 767 F.2d 321, 324 (7th Cir. 1985); *Rawlings* v. *Heckler*, 725 F.2d 1192, 1196 (9th Cir. 1984). A holding to the contrary in *Haitian Refugee Center* v. *Meese*, 791 F.2d 1489 (11th Cir. 1986), was vacated by the court of appeals in relevant part on December 4, 1986.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181463 40176